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No. 92-2058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC., *et al.*,
Petitioners,

v.

GRANT T. NORRIS,
Respondent.

On Writ of Certiorari to the Supreme Court for the State of Hawaii

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BRIEF OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The Railway Labor Executives' Association "RLEA") is an unincorporated association comprised of the chief executive officers of the following labor organizations: American Train Dispatchers (Dept. of BLE); Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employes; Brotherhood of Railroad Signalmen; Hotel and Restaurant Employees International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmits, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Longshoremen's Association; Sheet Metal Workers Interna-

tional Association; and United Transportation Union. These organizations represent the overwhelming majority of unionized railroad employees in the United States.

One of the purposes of the RLEA is to present, when necessary, a unified position on matters of interest to employees subject to the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* Accordingly, RLEA is concerned that the provisions of that Act are interpreted and enforced in a manner that protects both the federal and state statutory rights of railroad employees. RLEA submits that the decision of the Supreme Court of Hawaii under review here properly struck a balance between the legitimate police powers of a state in setting minimum standards of conduct by employees and the contractual dispute resolution procedures provided under the RLA in a manner that preserved the Respondent employee's rights under state law without frustrating the contractual interpretation processes of the RLA. Accordingly, RLEA respectfully submits this brief as *amicus curiae* in support of Respondent.[1]

SUMMARY OF ARGUMENT

RLEA submits that the RLA does not effect a complete preemption of state minimum labor standards applicable to employees. *Term. R.R. Ass'n v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 7 (1943). Therefore, enforcement of the judicially created Hawaiian state law protecting "whistleblowers" is preempted by the RLA only if enforcement of the state right frustrates the statutory regime created by Congress under the RLA. A thorough review of the purposes and functioning of that Act demonstrate that enforcement of a state law right independent of a right created by agreement does not frustrate the working of the RLA.

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[1] This brief is presented with the permission of the parties pursuant to Rule 37.3 of the rules of this Court.

The only direct RLA regulation of employee-employer conduct concerns the prohibitions against interference in the designation and choice of collective bargaining representatives contained in Section 2 Third and Fourth of the RLA. 45 U.S.C. § 152 Third & Fourth. The state whileblower protection at issue here does not touch on this regulated conduct. Therefore, the only way in which the RLA could preempt the state law is if boards of adjustment established under Sections 3 and 204 of that Act, 45 U.S.C. §§ 153 & 184, have been given jurisdiction by Congress of *all* disputes arising out of the employee-employer relationship. However a review of the legislative history of the RLA, decisions of the National Railroad Adjustment Board ("NRAB") and decisions of this Court demonstrate that the boards of adjustment do not have that expansive jurisdiction.

The term "grievances" used in the jurisdictional grant contained in both Sections 3 and 204 refers to the claims of individuals under color of an employment contractual right. This is the manner in which the proponents of both the original 1926 RLA and its 1934 amendments creating the current Section 3 described the term. Subsequently that definition was picked up in the House Report to the 1934 amendments and adopted by this Court in *Bhd. of R.R. Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30, 33 (1957). The same working definition has been utilized by all four divisions of the NRAB when resolving questions of its jurisdiction to act.

The decisions of this Court, notably *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239 (1950), hold that the NRAB has exclusive jurisdiction to resolve contractual interpretation disputes. Indeed, in *Andrew v. Louisville & N.R.R.*, 406 U.S. 320 (1972) this Court held that *any* claim asserted based upon rights contained in a collective agreement must be presented to the NRAB for resolution. However, in *Andrews*, this Court did not hold that an employee's claim of rights under a state law

that was independent of rights arising under the collective agreement was preempted. Instead, RLEA submits that this Court's earlier decision in *Terminal Railroad* and the later decision in *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987) support the conclusion that independent rights arising under either state or federal law may be enforced in forums other than the NRAB and such independent claims are not preempted by the RLA.

Petitioner Hawaiian Airlines' ("Hawaiian") reliance on the reference to the "omitted case" mentioned in *Elgin, J. & E.R.R. v. Burley*, 325 U.S. 711 (1945) is equally unavailing. The omitted case is merely a short-hand reference to a claim of right arising under either an implied-in-fact collective agreement or an agreement applicable to an individual on matters the parties agreed to omit from the collective agreement.

RLEA submits that the history and purpose of the RLA show that the preemption analysis utilized by this Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1987) for cases arising under Section 301 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, has equal applicability to the RLA. While the duty to arbitrate under the RLA is statutorily created, rather than created by contract as under Section 301, the obligation to arbitrate fulfills the same national labor policy: the peaceful resolution of disputes over the interpretation and application of agreements. Accordingly, the decision of the Supreme Court of Hawaii should be affirmed.

ARGUMENT

I. THE RAILWAY LABOR ACT DOES NOT COMPLETELY PREEMPT STATE REGULATION OF MINIMUM LABOR STANDARDS APPLICABLE TO EMPLOYEES OF CARRIERS SUBJECT TO THAT ACT

Over fifty years ago, this Court held that "the enactment by Congress of the Railway Labor Act was not a pre-emption of the field of regulating working conditions" by the states. *Terminal Railroad*, 318 U.S. at 7. In that case, the employees had obtained an order from the Illinois Commerce Commission mandating that the carrier supply a caboose on all trains operated by the carrier within the state. *Id.* at 3. This Court held that while the applicable collective bargaining agreement contained a provision regarding the placement of cabooses on the carrier's trains and, therefore, the dispute might have been brought before the National Railroad Adjustment Board ("NRAB") for adjustment, the employees were not obligated to do so in derogation of their rights under state law. *Id.* at 6.

This Court observed that in enacting the RLA, Congress did not undertake governmental regulation of rates of pay, rules or working conditions or otherwise set minimum standards applicable to them. 318 U.S. at 6. Instead, the dominant federal interest Congress fostered by the Act was that disputes over rates of pay, rules or working conditions did not result in an interruption to commerce. *Id.* In other words, Congress was interested in creating a *process* whereby disputes over rates of pay, rules and working conditions were resolved without either side to the dispute using economic self-help. Therefore, while certain working conditions that were regulated by the states could be the subject of collective bargaining under this process, this Court stated that "we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce

has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation." *Id.* at 7.

Again, in *Bhd. of Locomotive Engineers v. Chicago, R.I. & P.R.R.*, 382 U.S. 423 (1965), (hereinafter *Rock Island*) this Court considered, for the fourth time, whether two Arkansas statutes setting the minimum number of employees that a carrier must use on a train ("full crew laws") were preempted by federal labor legislation.[2] In that case, the carriers contended that special legislation passed by Congress to resolve an RLA collective bargaining dispute over the manning of trains preempted all state full crew laws. *Id.* at 427. This Court disagreed, noting that nothing in the legislation specifically stated that it should have such preemptive effect. *Id.* at 433. All Congress wanted to accomplish through the legislation was resolution of the collective bargaining dispute. *Id.* However, this Court noted that in some states, such as Arkansas, the size of the crew was already regulated by statute, not by agreement, so that the question of how many employees must be assigned to a train by the carrier in that state already had been resolved. *Id.* Therefore, this Court found that Congress did not intend to preempt existing state minimum labor standards on this matter as part of its resolution of the specific collective bargaining dispute between the parties. *Id.* at 437.

Thus, on at least three occasions, this Court has held that the RLA generally, and special legislation passed by Congress to resolve an RLA dispute, in particular, did not act as general preemption of state minimum labor standards laws. Significantly, Hawaiian and *amici* do not mention these cases despite their obvious relevance.

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[2] In the last "Full Crew" decision prior to *Rock Island*, *Missouri Pacific R.R. v. Norwood*, 283 U.S. 249, 258 (1931), this Court had stated that "[n]o analysis or discussion of the provisions of the [RLA] is necessary to show that it does not conflict with the Arkansas statutes under consideration."

Nevertheless, in order to reach the result which Hawaiian and *amici* seek here, this Court would necessarily have to overrule, or, at the very least, substantially limit, both *Terminal Railroad* and *Rock Island*. Indeed, Hawiian's and *amici's claim* is that even though there is no express mention by Congress in the RLA of an intention to fully occupy the field of regulating all working conditions applicable to employees one should be implied. However, as will be demonstrated below, the statutory scheme of the RLA does not support such a conclusion. Moreover, it must be noted that when Congress in the past has enacted legislation intended to effect a complete preemption of state law, it has made itself quite clear. *See*, 49 U.S.C. § 11341(a) (Carrier involved in Section 11343 proceeding under the Interstate Commerce Act "is exempt from the antitrust laws, and from all other law, including State and municipal law, as necessary to let that person carry out the transaction.") There is not even a hint of a similar preemptive effect in the RLA.

Indeed, the logical result of a complete preemption finding here would be that any agreement made by a union and carrier under the RLA would have the "force of federal law, ousting any inconsistent state regulation." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985). This Court held in *Allis-Chalmers* that Section 301 of the LMRA did not confer upon the parties "the ability to contract for what is illegal under state law." *Id.* Based upon the complimentary policies expressed in Section 301 and the RLA as discussed in Part III, *infra*, and further based upon this Court's discussion of the purposes of the RLA in *Terminal Railroad*, no different result should occur under the RLA. Therefore, any claim that the RLA completely preempts the field of state regulation of working conditions must be rejected as it was in *Terminal Railroad*.

II. AN EMPLOYEE'S ENFORCEMENT OF THE HAWAII STATE PROTECTION OF "WHISTLEBLOWERS" DOES NOT FRUSTRATE THE CLAIM AND GRIEVANCE RESOLUTION PROCEDURES ESTABLISHED BY CONGRESS IN SECTIONS 3 AND 204 OF THE RLA

A. The State Public Policy Protecting Whistleblowers From Wrongful Discharge Does Not Interfere Or Conflict With The Purposes Of The RLA

Even though the RLA may not act to completely preempt state minimum labor standards, certain state regulations may be struck down if they interfere with the federal scheme established under the Act. *See, Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 751 and n.32 (1985) (relying upon *Terminal Railroad* for the proposition that federal labor law is "interstitial", and supplements state law where compatible and supplants it only where the purpose of the federal act is frustrated by state action). Here, the Supreme Court of Hawaii has established a judicially created right for all Hawaii residents to be protected in their employment against discrimination because the employee reported an employer's alleged unlawful act to a regulatory agency. In other words, the Hawaii Supreme Court has established a minimum standard of conduct that *all employers* must follow in their dealings with their employees. That minimum standard does not frustrate the purposes of the RLA.

"The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & T.S.L.R.R. v. United Trans. Union*, 396 U.S. 142, 148 (1969). The means chosen by Congress to achieve that purpose included a "purposely long and drawn out" process of negotiating and changing the terms of collective bargaining agreement, *id.* at 149, *quoting, Bhd. of Ry.*

Clerks v. Florida East Coast R.R., 384 U.S. 238, 246 (1966), as well as compulsory and binding arbitration of disputes regarding the interpretation of those agreements. *Chicago River*, 353 U.S. at 39.

The only employer conduct towards employees expressly regulated by the RLA concerns interference by the employer with the employees' rights to organize and bargain collectively (45 U.S.C. § 152 Third & Fourth) and discrimination because a prospective employee is or is not a union member. 4 U.S.C. § 152 Fifth. Those rights may be enforced either by the employees through a civil action in federal court, *Texas & N.O.R.R. v. Bhd. of Ry. Clerks*, 281 U.S. 548, 567-71 (1930), or in criminal proceedings initiated by a U.S. Attorney acting under Section 2 Tenth, 45 U.S.C. § 152 Tenth. The balance of the Act is devoted to fostering collective bargaining by regulating the mechanics of making or maintaining collective agreements and by limiting the possibilities that disputes surrounding the making or interpretation of those agreements may interrupt commerce. *Terminal Railroad*, 318 U.S. at 6. *Shore Line*, 396 U.S. at 150-51; *Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302-7 (1989). Therefore, the whistleblower protection provided under Hawaii law, which does not involve itself with collective bargaining, surely does not in any way frustrate any express regulation of employer conduct set forth in the RLA. The remaining major area of inquiry is whether an employee's assertion of a right under state law that is independent of the terms of a collective bargaining agreement somehow frustrates the contract interpretation and application dispute resolution procedures contained within the Act. RLEA submits that a thorough review of the evolution of those processes reveals that there is no apparent conflict, and, accordingly, the RLA does not preempt the whistleblower protections created by the Supreme Court of Hawaii.

B. Section 3 of the RLA Does Not Confer Jurisdiction Upon The NRAB To Resolve All Claims Arising Out Of The Employee-Employer Relationship

Section 3 First (i) as well as Section 204 confers jurisdiction upon arbitration panels to resolve "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." Hawaiian and *amici* contend that permitting an employee to bring an action under state law for wrongful discharge necessarily interferes with the operation and jurisdiction of these arbitral panels because they have jurisdiction to resolve noncontractual grievances arising out of the employee-employer relationship. This argument, based largely upon excerpts of floor debates concerning the 1926 Act and the reference to the "omitted case" in *Burley*, is largely ahistorical and ignores the fact that the term "grievances" used in Section 3 First(i) has consistently been used by the sponsors of the RLA, the National Railroad Adjustment Board and decisions of this Court to refer to claim of contractual entitlement only.

1. *At The Time Of The Enactment Of The RLA in 1926 And Its Amendment in 1934, Individual Contracts Of Employment Could Subsist With Collective Agreements*

"The Railway Labor Act of 1926 cannot be appreciated apart from the environment out of which it came and the purposes which it was designed to serve." *Burlington Northern R.R. v. Bhd. of Maintenance of Way Employes*, 481 U.S. 429, 444 (1987) (internal quotations omitted). Although, the federal control of the railroads during World War I had resulted in increased unionization of railroad employees, by 1926 not all employees were represented by a union, and not even all represented employees were subject to a *collective* agreement setting rates of pay, rules and working conditions.

Indeed, when Congress, in 1916, enacted the Adamson Act, 45 U.S.C. § 65, setting the standard day's work at eight hours, the statute expressly applied to "contracts for labor and service" as opposed to agreements between groups of employees and a carrier or carriers.

This Court did not address the role of individual contracts under the RLA until its decision in *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 346 (1944) wherein this Court held that individual contracts of employment could not be entered into in derogation of rights already provided in the collective contract. However, this Court added that all such individual agreements were not presumptively unlawful because the carrier and representative could agree "that particular situations are reserved for individual contracting, either completely or within prescribed limits." *Id.* at 347.[3] Therefore, at the time of the enactment of the RLA in 1926 and its amendment in 1934 (*see*, 45 U.S.C. § 152 Eighth), and beyond, individual contracts of employment were either the sole or supplementary source of contractual rights of railroad employees *vis-a-vis* their employers.

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[3] In *Telegraphers* and *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944), its companion case arising under the NLRA, 29 U.S.C. § 151, *et seq.*, recognized the statutory limits both Acts placed upon the negotiation of individual agreements setting the actual terms and conditions of employment for individual employees. Under the collective bargaining processes of both acts, collective bargaining "results in an accord as to terms which will govern hiring and work and pay in that unit." *J. I. Case*, 321 U.S. at 334-5. Therefore, this Court noted that after negotiation of the collective or "trade" agreement, "[t]here is little left to individual agreement except the act of hiring." *Id.* at 335. As this Court held (*id.* at 337):

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA] looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

This background is requisite to an accurate understanding of the jurisdictional grant conferred upon the NRAB in Section 3 First(i). RLEA submits this statutory formulation equates "grievances" with the claims of *individual* employees under either individual contracts of employment setting terms and conditions of employment or the terms of the collective agreement applicable to the class of employees in which the individual is employed. The term "interpretation" of agreements applies to claims advanced by the designated collective representative under the collective agreement and generally would refer to "classwide" claims. However, both "grievances" and "interpretation disputes" (hereinafter "claims") must have their basis in an agreement setting rates of pay, rules or working conditions applicable either to the individual or to a class of employees. With this background, the 1934 amendments ot the RLA establishing the jurisdictional reach of the NRAB, and, in effect establishing the jurisdiction of airline system boards under Section 204, can be placed in context.

2. *The Term "Grievance" As Used By The Proponents Of Both The 1926 RLA And The 1934 Amendments To It, Contemplates Claims Arising Out Of Either An Individual Or Collective Contract Establishing Rates Of Pay, Rules Or Working Conditions For An Individual Claimant*

Section 3 of the 1926 Act provided for the voluntary establishment of adjustment boards composed of representatives of the employees and carriers only. Subsection (c) of that Section required that any agreement establishing such an adjustment board limit its jurisdiction to "disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." In testimony before the House Committee on Interstate and Foreign Commerce, Mr. Donald Richberg, labor spokesman for

the proposed bill, referred to "minor disputes" that sometimes were of "a very serious character, that involve discipline, for example, grievances, let us say, disputes over the application and meaning of an agreement." *Hearings before the Committee on Interstate and Foreign Commerce*, H.R. 7180 at 12 (January 26, 1926), *reprinted in, 2 The Railway Labor Act of 1926*. According to Mr. Richberg, the boards of adjustment proposed in Section 3 were to be given jurisdiction to resolve questions over the "very complicated agreements" in existence between the carriers and the employees. *Id.*[4]

The 1926 Act has been characterized by this Court as essentially an agreement between labor and the carriers that was ratified by Congress and the President. *Chicago & N.W. Ry. v. United Trans. Union*, 402 U.S. 570, 576 (1971). Accordingly, the observations of Mr. Richberg should be accorded great weight in determining the "intent" of the parties in this matter. *Id.* Mr. Richberg's statement above, coupled with his 1924 testimony, shows that the term "grievance" meant, even at this early date, a claim of right arising out of a contract.

The adjustment board procedures under the 1926 Act did not provide for compulsory, final and binding resolu-

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[4] In testimony before the Senate subcommittee of the Committee on Interstate Commerce in 1924 on a proposed bill establishing 4 national boards of adjustment, Mr. Richberg, defined a "grievance" as a "dispute [that] arises over the application of an agreement." *Hearings before the Committee on Interstate Commerce*, S. 2646 at 202 (April 4, 1924). Additionally, he answered certain carriers' criticisms that these adjustment boards would have an expansive jurisdiction to make rules, rather than interpret them thus (*id.* at 203):

> The second objection of Mr. Holder is that these national boards will standardize conditions, and that is an objection which lacks seriously any good faith. The answer is that this is precisely what the present Labor Board does and precisely what these boards will not do, because the present Labor Board not only interprets rules but makes rules, thus inducing standardization of rules. The proposed boards only interpret rules.

tion of the disputes. Instead, resolution of these disputes was left to voluntary arbitration or negotiation. Accordingly, the number of unadjusted claims accumulated to the point that several labor organizations threatened strikes in order to get them resolved. *Union Pacific R.R. v. Price*, 360 U.S. 601, 610-11 (1959).

With this turmoil as background, the Federal Coordinator of Transportation, Joseph B. Eastman, drafted language for an amendment to the RLA that would provide for the creation of an independent national board of adjustment with exclusive jurisdiction over disputes arising out of the interpretation or application of collective bargaining agreements. *Chicago River*, 353 U.S. at 36-7; *Burley*, 325 U.S. at 726. Mr. Eastman's proposal was adopted by Congress as Section 3 First of the RLA creating the NRAB. *Burley*, 325 U.S. at 726.[5]

Mr. Eastman's testimony, as well as that of others, before the Senate committee considering the amendments used the terms "interpretation" and "grievance" interchangeably to mean an assertion of a contractual right.[6] In response to the argument raised by the American Short Line Railroad Association that Section 3 should not apply to railroads of less than 100 miles in length, Mr. Eastman responded thus:

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[5] In the Senate floor debate on the amendments, the floor manager Senator Dill stated to the Senate that Mr. Eastman had prepared the original amendments to the Act and he further stated that "[Mr. Eastman] approves the amendments the Senate Committee has adopted and appearing in the bill as reported to the Senate." *Debate on S. 3266, June 18, 1934, as reprinted in, 1 The Railway Labor Act of 1926* at 936.

[6] Mr. Eastman has been described as "one of the weightiest voices before Congress on railroad matters." *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 304 (1954). Mr. Eastman's testimony in 1934 before the Senate and House Committees on the proposed amendments to the Railway Labor Act was cited extensively by this Court in the *Chicago River case*. 353 U.S. at 34-37.

> The Board would not handle major issues relative to wages, rules, and working conditions. All that it would handle would be minor issues relating to the interpretation of such rules as exist and to grievances of employees under established rules.

Hearings before the Committee on Interstate Commerce, S. 3266 at 158 (April 19, 1934), *reprinted in 3 The Railway Labor Act of 1926*.

Similarly, George M. Harrison, President of the Railway Clerks and the spokesman for RLEA, discussed claims and grievances as follows:

> Now the other class of controversy is the disputes that arise out of the application of that agreement to the practical situation on the railroad. For instance, we may have a claim for time claiming that the rule of the contract should provide for the payment of so much. The railroad may dispute that and claim that they understand it to be another way. We may have a grievance concerning seniority of a man; we may have a grievance concerning the dismissal of a man, the promotion of a man, reduction of force. There are a thousand and one different kinds of controversies that can develop. Those are the controversies that will be settled by the national board. The parties in the first instance have agreed on the contract; they have laid down rules.

Hearings before the Committee on Interstate Commerce, S. 3266 at 34 (April 11, 1934), *reprinted in 3 The Railway Labor Act of 1926*.

RLEA submits that the testimony of Messrs. Eastman and Harrison supports the contention that "claims" are class-wide disputes and "grievances" are disputes particular only to an individual. However, it is apparent in the testimony of Mr. Harrison, an experienced labor union official, that the two terms are used somewhat interchangeably in practice by 1934.[7] Certainly what is undisputed

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[7] Mr. Harrison was subsequently appointed by President Roosevelt to serve upon the "Committee of Six" a group composed of

in both men's testimony is that both "claims" and "grievances" must have their basis in a right arising from an existing *agreement* setting rates of pay, rules and working conditions. Similarly, the House Report to the House of Representatives' version of the 1934 amendments noted in its discussion the newly proposed Section 3 that:

> [t]he second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances', which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages, rules and working conditions.

H.R. Rep. No. 1944, 73d Cong., 2d Sess., at 2-3 (June 11, 1934), *reprinted in, 1 The Railway Labor Act of 1926* at 919-20. Moreover, in *Chicago River*, this Court defined the term "grievance" thus (353 U.S. at 33):

> These are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee.

This working definition is identical to the one utilized by the NRAB to determine its jurisdiction since 1934.

3. *The NRAB Has Consistently Held That Its Jurisdiction Is Only Coextensive With Claims Of Right Arising Under An Agreement*

The NRAB is an "agency peculiarly competent" to resolve disputes concerning the interpretation of collective bargaining agreements. *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 566 (1946). The Congressional purpose behind the NRAB was to vest this agency, composed of representatives of labor and carriers, with the authority to make interpretations of collective bargaining

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carrier and labor officials charged with recommending to Congress the appropriate level of statutory protective conditions for railroad employees adversely affected by railroad mergers and consolidations approved by the Interstate Commerce Commission. *Ry. Labor Executives' Ass'n v. U.S.*, 339 U.S. 142, 148-9 & n.10 (1950).

agreements that are final and binding upon the parties. 45 U.S.C. § 153 First(m). Accordingly, the decisions of the various divisions of the NRAB regarding their jurisdiction and remedial authority should be given substantial deference.

In practice, the NRAB does not adhere to the dichotomy between "grievances" and "claims" advanced by Hawaiian and *amici*. For example, in an award of the Third Division resolving a "grievance" on behalf of an employee that his seniority ranking was improper, the Board held:

> We note, moreover, that Petitioners' claim does not allege that Noyes' inclusion on the disputed seniority roster violated any specific provision of the Agreement. It does not, in short, center upon the interpretation of the contract between the Parties. Accordingly, it does not constitute a dispute 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions." Yet, it must in order for this Board to establish jurisdiction under Section 3, First (i) of the Railway Labor Act.

NRAB Third Division Award No. 25543 (Aiges, Referee) (1985). Similarly an award of the Second Division dismissing a claim for lack of jurisdiction held "[i]t is well settled that the jurisdiction of this Board is confined to disputes which flow from grievance provisions of a collective bargaining agreement." *NRAB Second Division Award No. 11768 (Carter, Referee)* (1989). Similarly, the First Division dismissed a claim for reinstatement by an employee not subject to any collective agreement. *NRAB First Division Award No. 23909 (Twomey, Referee)* (1986). In a similar situation, the Fourth Division denied a claim for reinstatement by an employee not subject to a collective agreement. *NRAB Fourth Division Award*

No. 4205 (McAllister, Referee) (1985).[8] The NRAB's uniform administrative treatment of the parameters of its jurisdiction emphasizes this Court's observation that the defining characteristic of a dispute referable to the NRAB is "that the dispute may be conclusively resolved by interpreting the existing agreement." *Conrail*, 491 U.S. at 305.

4. *The Transfer Of Certain Pending Disputes Involving Air Carriers From The National Labor Relations Board To Section 204 System Boards Following The 1936 Amendments To The RLA Does Not Vest Jurisdiction In Those Boards To Resolve Claims Not Based Upon An Existing Contract*

Hawaiian has relied upon language in Section 204 transferring to system boards "cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board ["NLRB"]" as somehow giving Section 204 boards a type of unfair labor practice jurisdiction. That interpretation is belied by the language of Section 204 read as a whole, the other portions of Title II of the RLA and by the House Report accompanying such legislation.

The transfer of cases from the NLRB to Section 204 boards is mentioned in the same sentence conferring jurisdiction upon the Boards to disputes over "grievances or . . . the interpretation or application of agreements concerning the rates of pay, rules or working conditions." Moreover, Section 206, 45 U.S.C. § 186, also provided that:

> All cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving any dispute arising from any cause between any common carrier by air engaged in interstate or foreign commerce or any carrier by air transporting mail for or

[8] Copies of these Awards are contained in the Appendix.

> under contract with the United States Government, and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the Mediation Board.

Therefore, Section 204 did not transfer all pending air carrier cases before the NLRB to arbitration panels. This distinction is made more apparent by the House Report's discussion of the function of the National Air Transport Adjustment Board authorized to be established under Section 205, 45 U.S.C. § 185, which was to have concurrent jurisdiction with Section 204 boards thus:

> This new adjustment board will be created and will function in the same manner as the railway board, excepting that it need not be established immediately but only when deemed necessary by the Mediation Board. The reason for this permissive delay in its formation is that there is nothing for such a board to do until employment contracts have been completed, and there are not such contracts in operation now.

H.R. Rep. No. 2243 at 1 (March 26, 1936), *as reprinted in, 1 The Railway Labor Act of 1926, A Legislative History* 1050. Accordingly, there is no basis in the limited legislative history of Title II of the RLA to infer that a greater jurisdictional grant was given to boards of adjustment under Section 204 than that granted to boards of adjustment created under Section 3.

5. *This Court Has Consistently Held That The NRAB's Jurisdiction Is Limited To Resolution Of Claims Arising Under Contracts*

This Court's numerous decisions regarding the jurisdiction of the NRAB also have placed no importance on the distinction between "grievances" and "claims", other than that either must have its basis in a contractual right. Indeed, those decisions, like the testimony of Messrs. Eastman and Harrison, tend to use the terms interchange-

ably to refer to disputes regarding the interpretation of application of existing collective bargaining agreements.

In *Pitney*, this Court held that federal courts were without jurisdiction to interpret the meaning of collective bargaining agreements because such responsibility was exclusively within the province of the NRAB. 326 U.S. at 567. Similarly, in *Slocum*, this Court held that state courts lacked jurisdiction to interpret collective bargaining agreements. The dispute in question concerned which union's contract applied to certain work performed by the carrier. Resolution of that dispute would have both retrospective and prospective effect on the relations between the unions and the carrier. As this Court observed, "[t]his type of grievance has long been considered a potent cause of friction leading to strikes." *Id.* Accordingly, in order to ensure that the RLA's purpose was not thwarted, this Court reasoned that Congress had established the NRAB, an agency to "provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway system." *Id.* at 243. That result was required in order to promote the primary purpose of the RLA; *i.e.*, avoidance of interruptions to interstate commerce resulting from "grievances arising under existing agreements." *Id.* at 242. Therefore, based upon the purposes of the Act and the dispute resolution procedures provided therein, this Court held that the NRAB had exclusive jurisdiction to adjust "grievances and disputes of the type here involved." *Id.* at 244.

This need for uniformity in the construction and application of existing collective bargaining agreements was again emphasized in *Pennsylvania R.R. v. Day*, 360 U.S. 548, 553-4 (1959) wherein this Court held that a retired employee was not permitted to bring an action in state court for claims accruing under the collective bargaining while the employee had been in active service. Finally, in 1972, this Court eliminated the last exception to NRAB jurisdiction of claims arising out of collective bargaining agreements in *Andrews*.

However, *Andrews*, does not create an expanded jurisdiction for the NRAB to resolve non-contractual grievances related to employee discipline. In *Andrews*, this Court overruled its earlier decision in *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941) that had permitted discharged employees to commence wrongful discharge actions in state court rather than seek reinstatement under the existing collective bargaining agreement and NRAB procedures. *Id.* at 326. This Court noted that the "concept of 'wrongful discharge' implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will." *Id.* at 324. In the case at bar, the employee conceded that "the only source of [his] right not be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement." *Id.* Therefore, in a state court action for wrongful discharge, the court would be required to determine the employee's rights solely by basis of an interpretation of the existing contract. *Id.* In other words, the same vice apparent earlier in *Slocum*, was present here: a state court interpreting a collective bargaining agreement, a task given by Congress exclusively to the NRAB. Accordingly, the decision in *Andrews* rested upon the long-standing view that the NRAB had exclusive jurisdiction to resolve all disputes that required the interpretation or application of an agreement setting rates of pay, rules or working conditions.

Significantly, in *Andrews* there was no discussion of what would occur if the employee asserted a source of protection against wrongful discharge independent of the collective bargaining agreement. That *Andrews* did not implicitly foreclose such an argument is evident from this Court's characterization of it in *Buell*, 480 U.S. at 566 (emphasis added):

> In *Andrews*, an employee brought a state wrongful discharge claim based *squarely on an alleged breach*

> *of the collective-bargaining agreement.* We held that Congress had intended the RLA dispute resolution mechanism to be mandatory for that type of dispute, and that courts were therefore foreclosed from addressing claims that properly arise under the RLA.

Indeed, the situation confronting this Court in *Andrews* was remarkably similar to that presented under Section 301 in *Allis-Chalmers*. There, the employee's claim under state law was derived from rights conferred by the collective bargaining agreement and resolution of that claim was preempted by the compulsory arbitration provisions in the collective bargaining agreement. 471 U.S. at 215-16.

The foregoing cases establish the proposition that the NRAB is the exclusive forum for the resolution of disputes arising under contracts. These disputes include "grievances" which are simply another term for an individual's claim of rights arising under a contract. There is nothing in these decisions that supports Hawaiian's claim that the NRAB has jurisdiction of non-contractual "grievances" or claims by employees. RLEA submits that the jurisdictional reach of Section 3 and Section 204 arbitration under the RLA is generally coextensive with Section 301 arbitration under the LMRA and, as shown in Part III, *infra*, the *Lingle* standards for preemption under Section 301 apply with equal force to the RLA.

C. The "Omitted Case" Described in *Burley* Does Not Vest Jurisdiction In The NRAB To Resolve Non-Contractual Claims Or Grievances

The only remaining argument available to Hawaiian and *amici* is that this Court's mention of the "omitted case" in *Burley* establishes a doctrine that non-contractual disputes between employees and employers are within the exclusive jurisdiction of the NRAB. However, the "omitted case" referred to therein is only a short-hand reference to claims arising out of an agreement applicable to an employee other than the written collective bargaining agreement. In other words, the "omitted case" still has its foundation in "rights accrued" under an existing agreement, which is the essence of the minor disputes discussed in *Burley*.

In *Burley* this Court considered the issue of whether a duly designated collective bargaining representative was empowered by the RLA to settle "accrued monetary claims" or submit them to the NRAB to the exclusion of the employees' right to bring those claims in their individual names to that same agency. 325 U.S. at 712. Part of the Court's analysis involved distinguishing those RLA disputes that were subject to NRAB jurisdiction from those which were not. The Court issued its now famous definition of "minor disputes" that included the "omitted case", *i.e.*, a claim "founded upon some incident of the employment relations, or asserted one, independent of those covered by the *collective agreement*, *e.g.*, claims on account of personal injuries." *Id.* at 723 (emphasis added).

In *Burley*, the Court was not confronted with an actual dispute involving an "omitted case" as the claims at issue were for monetary damages under the existing collective bargaining agreement. *Id.* at 712. However, the Court did refer to an individual employee's personal interest in the resolution of a grievance against the carrier "where [it] arises from the incidents of the employment not covered by a collective agreement." *Id.* at 736.

RLEA submits that the omitted case primarily concerns implied-in-fact agreements between the employer and either the union or employees. As this Court has noted, a written RLA collective bargaining agreement does not contain all working conditions to which the parties have agreed. *Pittsburgh & L.E.R.R. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 503 (1989). Therefore, a practice that was mutually satisfactory to the parties could have been omitted from their written memorandum. *Id.* at 504. Indeed, the issue presented in *Conrail* involved an

"omitted case" because there was no provision in the written collective agreement regarding return to duty physical examinations. 491 U.S. at 312. The dispute there concerned whether the carrier's inclusion of a drug-screen urinalysis to these examinations was permitted under the implied-in-fact agreement. *Id.* at 315. Therefore, the dispute concerned the extent of the parties' accrued rights under this "omitted case", *i.e.*, the implied-in-fact agreement.[9]

That the omitted case must have some basis in the contractual relationship between the employer and employees is apparent from this Court's subsequent treatment of individual claims that would otherwise be considered "omitted cases" under the definition proffered by Hawaiian.

In *Buell*, the Court actually addressed the example it had given in *Burley* for the "omitted case": a claim on account of personal injuries brought under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.* In that case, an employee alleged that the carrier had negligently permitted a workplace environment to exist wherein he suffered physical and mental injuries. 480 U.S. at 559. The carrier argued that rather than bring an action under FELA, the employee should have been required to bring a grievance against such conditions because the "exclusive forum for any dispute arising out of workplace conditions is the RLA." *Id.* at 563. This Court rejected that argument. While this Court acknowl-

[9] The omitted case also could apply to the situation discussed in *Telegraphers*, wherein this Court had observed that in formulating the collective agreement, the parties could agree that certain matters were "reserved to individual contracting" (321 U.S. at 347), *i.e.*, "omitted" from the collective agreement. This view of the omitted case is consistent with this Court's concern in *Burley* that the agent of the employee demonstrate some specific power of attorney to resolve the employee's individual claim of right under an agreement independent of those matters covered by the collective agreement.

edged that the employee could bring a grievance pursuant to the collective bargaining agreement alleging that the working conditions created by the carrier violated the terms of that agreement, that right to grieve did not foreclose the employee's resort to an independent federal statutory right and remedy for the same conduct that could have been grieved. *Id.* at 565. In other words, *Buell* resolved the question of concurrent rights under contract and federal statute in a manner identical to that made in *Terminal Railroad* some 44 years before regarding state rights.[10]

The significance of *Buell* is that it demonstrates the limits of the omitted case in practice. Certainly, the expansive assertion of NRAB jurisdiction argued by the carrier in *Buell* was rejected. Indeed, in *Buell*, as in *Terminal Railroad*, this Court applied an analysis remarkably similar to the one undertaken in *Lingle*. In all three cases, the employees had a contractual right to seek a limited contractual remedy. However, the existence of that contractual remedy did not mean that it was exclusive. Instead the contractual remedy was complementary to an independent state or federal right possessed by the employees. *Buell* and *Terminal Railroad*, therefore, stand

[10] Similarly, in *McKinney v. Missouri-K.-T.R.R.*, 357 U.S. 265 (1958), this Court held that a returning veteran could assert his reemployment rights under the Universal Military Training and Service Act, 62 Stat. 614-18, without exhausting his contractual claims before the NRAB. As part of its discussion, this Court stated (*id.* at 270):

> [t]o insist that the veteran first exhaust other possibly lengthy and doubtful procedures on the ground that his claim is not different from any other employee grievance or claim under a collective bargaining agreement would ignore the actual character of the rights asserted and defeat the liberal procedural policy clearly manifested in the statute for the vindication of those rights.

Therefore, even though the employee's claim concerned a matter within his relationship with the employer, its noncontractual nature did not require submission of the dispute to the NRAB.

for the proposition that an employee who asserts an independent right under state or federal law that does not rest on a right created under the collective or individual agreement, may assert that federal or state right in proceedings independent of any proceeding before the NRAB.

III. THE POLICIES FAVORING COMPULSORY ARBITRATION OF CONTRACTUAL DISPUTES UNDER SECTION 301 OF THE LMRA ARE IDENTICAL TO THE POLICIES UNDERLYING THE STATUTORY DUTY TO ARBITRATE SIMILAR DISPUTES UNDER SECTIONS 3 AND 204 OF THE RLA

The foregoing extended discussion of the limits of the NRAB's jurisdiction demonstrates why this Court's holding in *Lingle*, also is applicable to the RLA. In *Lingle*, this Court held that "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 purposes." RLEA submits that the preemptive effect of the RLA is the same as Section 301 of the LMRA, 29 U.S.C. § 185, in all cases where there is a collective bargaining agreement establishing a grievance and arbitration remedy.

Lingle presupposes the existence of arbitration provisions that are the exclusive remedy for disputes arising under a collective bargaining agreement, and decides what the impact of a mandatory arbitration provision is on state-law claims that are independent of the agreement. Thus, in *Lingle*, the preemption analysis starts with the assumption that if the claim involved a dispute arising out of the interpretation of a collective bargaining agreement, arbitration would be the exclusive remedy. What is clear from *Lingle* is that this Court did not concern itself with the possibility that the parties could have reached an agreement that did not require them to arbi-

trate disputes. That issue is irrelevant to the preemption analysis in *Lingle*.[11]

Therefore, the fact that the RLA statutorily mandates that an employee submit all disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" to adjustment boards does not meaningfully distinguish cases that concern the preemptive effect of Section 301 from those involving the Railway Labor Act. Indeed, although employees under the jurisdiction of the NLRA have the choice as to whether or not they desire to negotiate an agreement that requires parties to submit contractual disputes to arbitration, once that choice has been made, arbitration becomes the exclusive remedy by operation of Section 301. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965). This Court has made clear that where parties have agreed to submit disputes to arbitration, Section 301 does not permit them to evade that obligation even though the decision to include a mandatory arbitration provision in an agreement was voluntary. *Allis-Chalmers*, 471 U.S. at 220. This is so, because a "rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has responsibility to interpret the labor contract in the first instance." *Lingle*, 486 U.S. at 411, *quoting*, *Allis-Chalmers*, 471 U.S. at 220.

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[11] Even if the parties had not agreed to arbitration of any disputes involving the interpretation or application of the collective agreement, the preemption analysis would be the same. This is because Section 301 requires that any court interpreting the collective agreement apply a developing federal common law to the meaning of its terms. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 419, 431 (1957). Therefore the concerns regarding uniformity of result in contract interpretation disputes apply with equal force under both Section 301 and Section 3 of the RLA. *Slocum*, 339 U.S. at 243.

In deciding *Lingle*, it is evident that this Court was mindful of the extreme importance to stable industrial relations of the preemptive effect of Section 301 since the Court discussed in detail those seminal decisions concerning that very issue. This Court noted that its earlier decision in *Teamsters v. Lucas Flour, Co.*, 369 U.S. 95 (1962), held that:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of the process thus strikes at the very core of federal labor policy.

In another *pre-Lingle* case involving preemption under Section 301, where the collective bargaining contract contained a "mandatory grievance adjustment or arbitration procedure" (*Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 254 (1970)) and the employer sought to enjoin a strike in breach of a no-strike obligation in the agreement, this Court stated that the "very purposes of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures." Id. at 245. In *Boys Market*, this Court held that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, must be accommodated to permit an anti-strike injunction issued in order to require specific performance of a contractual arbitration provision under Section 301. In so holding, this Court, relying upon *Chicago River*, stated that the mandatory arbitration provisions of the RLA, like Section 301, are necessary to the "peaceful settlement" of disputes. Therefore, although *Chicago River* "involved arbirtation procedures established by statute", the principles elaborated in that case were "equally applicable" to the Section 301 case in light of the "importance that Congress has attached to the voluntary settlement of labor disputes without the resort to self-help and more particularly to arbitration as a means to this end." Thus *Boys Market* not only stands for the proposition that mandatory arbitration provisions are crucial to furtherance of the national labor policy favoring industrial peace through arbitration of contractual interpretation disputes, but that these principles, by reliance on *Chicago River*, are equally applicable to both the NLRA and RLA.

While aware of the importance of mandatory arbitration to industrial peace, this Court in *Lingle* recognized that Section 301 does not preempt claims that find their source in non-contractual claims. The stability derived from industrial self-government through the grievance machinery does not mean, as found by the *Lingle* Court, that federal labor law automatically preempts non-contractual claims brought by unionized workers against their employers.

In view of the fact that strict adherence to mandatory arbitration provisions for the resolution of disputes arising out of agreements is critical to the effectuation of the purpose of Section 301, it is evident that the RLA can have no greater preemptive force than Section 301 unless Section 3 First (i) requires submission of non-contractual disputes to adjustments boards. However, as explained in Section II, *supra*, only disputes arising out of the interpretation or application of agreements must be submitted to adjustment boards constituted under the RLA. Therefore, it follows that the holding in *Lingle* should have application to cases concerning the preemptive effect of the statutorily mandated arbitration of claims and grievances under the RLA.

CONCLUSION

For the reasons set forth above, RLEA submits that the decision of the Supreme Court of Hawaii should be affirmed.

Respectfully submitted,

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Attorneys for the Railway Labor Executives' Association

Dated: April 1, 1994

APPENDIX

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award Number 22543
Docket Number MS-25728

Stanley L. Aiges, Referee

PARTIES TO DISPUTE:

(Thomas J. Ryder and John F. Heaphy, Jr.
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

We the undersigned wish to establish seniority in the classification of Inspector.

OPINION OF BOARD:

The Petitioners here are Employes of the Carrier's Signal Department. They protest the failure to list their names on the Signalman Roster for Seniority District 1 (revised 3/12/82) with seniority in the classification of Inspector. Their protest, it is clear, arises out of the fact another employe's name (D. Noyes) so appears on that roster. Noyes' name appears there as the direct result of an agreement reached between Representatives of the Carrier and the Employes (*i.e.*, Brotherhood of Railroad Signalmen). They reached that decision in System Docket 1722 in accordance with the terms of Item 1 of Appendix "R". Their decision was based upon their belief that Noyes had previously held an Inspector position on former B&A territory. Significantly, the contracting parties later revisited the facts in Mr. Noyes' case and decided that he was improperly granted Inspector seniority pursuant to Item 1 of Appendix "R"; therefore, his proper seniority date in the Inspector class was changed from *August 30, 1976* to September 7, 1982, pursuant to Rule 3-B-2.

The Agreement of the Parties to place Noyes' name on the disputed seniority roster is a valid one. It simply is not subject to attack here. It is, in our view, final and binding on all concerned.

We note, moreover, that Petitioners' claim does not allege that Noyes' inclusion on the disputed seniority roster violated any specific provision of the Agreement. It does not, in short, center upon the interpretation of the contract between the Parties. Accordingly, it does not constitute a dispute "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions. Yet, it must in order for this Board to establish jurisdiction under Section 3, First (i) of the Railway Labor Act.

Under the circumstances, this claim must be denied.

FINDINGS:

The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

/s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1985.

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Form 1

Award No. 23909
Docket No. 43538
89-1-88-1-M-2012

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE:

(Lawrence E. Altoff
(
(Maryland Midland Railway, Inc.

STATEMENT OF CLAIM:

"Allow Employee Laurence E. Altoff, all lost earnings, including 'Car Pay, 37 hours—40 minutes Compensatory Time, Vacation etc. Health and Welfare Benefits, discipline removed from service record, and restoration to service with seniority unimpaired for having been unjustly dismissed, on approximately 19 August 1987.' "

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The record shows the Claimant was employed on April 6, 1986, in engine and train service and was dismissed on August 19, 1987, on the grounds his job performance was unsatisfactory.

The Claim before the Board is for reinstatement and pay for time lost. While there is considerable argument, on both sides, concerning the merits of the Carrier's decision to terminate Claimant, the Board finds that it must dismiss the Claim on jurisdictional grounds.

It is well settled that the jurisdiction of the Board is restricted by statute to disputes involving "the interpretation or application of labor agreements." The record before the Board, however, reveals there is no Collective Bargaining Agreement in effect on this Carrier and, therefore, there are no Agreement rules to interpret or apply.

The Board has no alternative but to dismiss the Claim. For similar holdings, see Fourth Division Awards 4410, 4478, 4508, 4510 and 4548.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT
BOARD
By Order of First Division

Attest:

/s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 13th day of January 1989.

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Form 1

Award No. 11768
Docket No. 11655
88-2-88-2-214

The Second Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

PARTIES TO DISPUTE:

(Transportation Communications Union
(
(Chicago Short Line Railway Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood
(GL-10285) that:

1. Carrier violated the objective conditions of employment when, following an investigation on January 5, 1988, it suspended Car Repairman Helper W. Metzger from service for a period of ten (10) days, commencing on January 21, 1988;

2. Carrier shall now compensate Mr. Metzger for all time lost and shall clear his record of the charge placed against him.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The record indicates that at the time of the occurrence giving rise to the dispute herein there was no collective bargaining Agreement in effect governing rates of pay and working conditions of Claimant.

The burden is upon the Organization to prove that a collective bargaining Agreement was in effect at the time of the occurrence involved, and that such Agreement was violated by the Carrier. It is well settled that the jurisdiction of this Board is confined to disputes which flow from grievance provisions of a collective bargaining Agreement.

There is no proper basis for this Board to consider the dispute and the Claim will be dismissed. (See Fourth Division Award 4683).

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:

/s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois this 27th day of September 1989.

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Form 1

Award Number 4205
Docket Number 4211

Referee Robert W. McAllister

PARTIES TO DISPUTE:

James C. Johnson
Seattle and North Coast Railroad Company

STATEMENT OF CLAIM:

(1) That on February 4, 1983 I, James C. Johnson, was unjustly and discriminatorily discharged, and was then suddenly notified that my position of Administrative Assistant had been abolished; and

(2) that the position of Administrative Assistant be reinstated, and that I be reinstated in that position without discrimination or penalty, at the same pay rate or higher, and with all rights and full benefits repaired to their status as of the termination date including sick leave, vacation, insurance and retirement benefits; and

(3) that I be reimbursed back pay for the period since February 4, 1983 (less two weeks of severance pay already received) at the same pay rate.

OPINION OF BOARD:

The Claimant, James C. Johnson, was hired by the Carrier on March 8, 1982, as an Administrative Assistant. On February 4, 1983, the Carrier terminated the Claimant for refusing to accept work assignments, not following instructions, unauthorized activity, and insubordination.

From a review of the Claimant's outlined duties as Administrative Assistant, it is apparent the Claimant performed duties for the Carrier's President and Executive Vice-President relating to non-agreement, confidential matters. By his own admission, the Claimant was not a permanent employee nor is there a collective bargaining agreement in effect covering a class of employees such as his position as Administrative Assistant. The Claimant is unable to point to any practice or agreement which would support the inferred assertion his claim involves the interpretation or application of such terms.

This Board, therefore, concludes the Claimant to be a non-agreement employee. Furthermore, as indicated above, the Claimant has advanced no evidence to support the basis for an agreement interpretation.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The Carrier and the employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT
BOARD
By Order of Fourth Division

ATTEST:

/s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1985.